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IN THE

Supreme Court of the United States

October Term, 1969
No. 556

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Reply Brief to Brief for the United States in Opposition to the Petition for Writ of Certiorari.

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By permission of the Court, pursuant to telegrams (copies of which are attached to this brief and marked Appendix "A"), petitioner Southern California Edison Company (hereinafter "Edison") points to certain incorrect statements and pertinent omissions in the brief for the United States (hereinafter "Government") as follows:

1. In the Government's brief (Page 2) it is stated that 16 U.S.C. §522, provided in pertinent part:

> "The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles and lines for the generation and distribution of electrical power, * * *."

The pertinent part of the law which was *omitted* was that the general regulations permitted grants to "any [every] citizen, association or corporation of the United States." This omission shows in 16 *United States Code Annotated* 576.

2. On Page 3 of the Government's brief, it is stated that 16 U.S.C. § 523 provides in relevant part:

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the national forests of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *:"

However, the Government omitted that the general regulations applied to rights of way for electrical facilities to be granted "to any citizen, association or corporation of the United States . . ." The foregoing omitted portion is printed in 16 *United States Code Annotated* 577.

3. The Government omitted the dates of all cases cited and omitted a table of authorities cited. We understood that both the dates of the cases and such table should be included in all briefs. These, however, are *minutiae*. The important thing is the omission of the dates of the essential cases the Government relies upon. We exhibit a table showing such cases, the Government brief page where cited, and the year of decision.

Name and Citation of Case	Brief Page	Year Decided
So. Pac. Co. v. Olympian Co., 260 U.S. 205	6	1922
U.S. v. San Francisco, 310 U.S. 16	6	1940
Ickes v. Underwood, 141 F. 2d 546	7	1944
Springfield, etc. v. Springfield, 257 U.S. 66	8	1921
Puget Sound Co. v. Seattle, 291 U.S. 619	8	1934
St. Louis & S.F. R'y v. Mathews, 165 U.S. 1	8	1897
Crowell v. Benson, 285 U.S. 22	8	1932
N.Y. Cent. R.R. Co. v. White, 243 U.S. 188	8	1917
Louisville Gas Co. v. Coleman, 277 U.S. 32	8	1928

The citation of these old and frequently overruled or strongly criticized cases, as pointed out previously,

without date, must, we think, be taken as intentional and as having the purpose of distracting attention from the modern and controlling precedents.

The above table shows that no case essentially relied on by the Government was decided in the last 25 years, five of the nine are 40 years old, and one from the last century. We do not say that *Marbury v. Madison,* 1 Cr. 137, is not good law because it was decided in 1803, but we do say that, generally speaking, old cases on collateral issues which have been either overruled or distinctly limited ought to be neither persuasive nor convincing.

4. It hardly is correct to say that there is a presumption of the existence of facts justifying the secretary's policy in this case in light of the fact that, as previously pointed out, only a minute, hardly measurable percent of forest fires are caused by utility-generated or transmitted electricity.

> D. Ct. Cl. Tr. p. 121; 134 National Geographic Magazine (July 9, 1968) p. 127, quoting Malcolm Hardy, Director of the Cooperative Forest Fire Prevention Program of the United States Forest Service; Forest Service sponsored commercial, TV Channel 7, Los Angeles, August 4, 1968, cited and quoted in Appellant's Reply Brief, United States Court of Appeals (9th Cir.) p. 6.

5. The brief states on the authority of *Ivanhoe Irr. Dist. v. McCracken,* (1958) 357 U.S. 275, and *Southern Pac. Co. v. Olympian Co., supra,* that the executive department to which power is delegated, like Congress, may impose conditions on their [the public lands'] use. The *Ivanhoe* case was cited in our petition for certiorari (p. 13) and it holds that any discrimination in the use of federal lands can only be justified if it

is reasonable, *inter alia.* See particularly 357 U.S. at 295. This case would hardly seem to support the doctrine advanced by the Government that an executive department has the power to impose unconstitutional conditions by its rules or its contracts; yet, as we read the brief in opposition, that is exactly what the Government does say on Page 6. If the Government so says, the Government is wrong. The doctrine of unconstitutional conditions is extensively dealt with in our petition at pp. 14 and 15. The idea that the Government has any proprietary right in Government lands which gives it freedom from the Constitution in administering the same has been certainly set at rest.

Takahashi v. Fish, etc. Commission, (1948) 334 U.S. 410;

Purdy, et al. v. California, (1969) 71 Adv. Cal. Rep. 587.

6. The "Perko" cases, cited by Edison in its petition at pp. 10, 14 and 18, are said to raise no issue presented here. (Footnote 1, p. 5, Government Brief) This is incorrect. First, the *Perko* cases were said to be unexceptional in the Government's brief before the Circuit. (p. 22, pr. 7) Second, the *Perko* cases clearly hold that the Forest Service must administer the national forest fairly and without discrimination. These cases, six in number, were cited to this Honorable Court previously and the citations are in the table of authorities herein. They surely present one of the *very* issues presented here. Further, no mention is made in the Government's brief in opposition of *Jones v. Freeman,* (1968), 400 F. 2d 383, which we cited in our petition on p. 14, but the citation of which we omitted by error. This case held that (1) if the Secretary of Agriculture acted beyond the scope of his authority in promulgating an improper regulation, sovereign immunity is no defense; (2) *Perko v. U.S., supra,* was cited with approval; (3) that 16 U.S.C. § 551 authorized judicial review of such regula-

tions as the Secretary here made; (4) that something committed to agency *discretion* by law is not for that reason judicially unreviewable; and (5) since a new trial was granted and plaintiffs "will be entitled to a trial *de novo* if there is no administrative hearing, we need not consider whether failure to provide an administrative hearing is denial of due process." The fact that *Jones v. Freeman, supra,* is not even mentioned in the Government's brief is, we think, a concession, *sub silentio,* that its holdings are correct and it hardly supports the position of the Government here.

7. On Page 7 of the Government's brief it is stated at length that "under 16 U.S.C. § 551 and 16 U.S.C. § 522 the Secretary is authorized under general regulations to permit the use of the national forests for electrical plants, poles and lines for the generation and distribution of electric power and that statutory authority to impose absolute liability for fire supression costs as a condition of permitting the use of the national forests for electrical power lines is thus plain." Not only does the Government omit the pertinent portions of Section 522; namely, that the regulations are to be general and to govern any [every] citizen, association or corporation of the United States, but clearly there is nothing in Section 551, Section 522 or any other section which confers on the Secretary or any other Government official authority to impose absolute liability on one utility and liability based only on negligence on another.

One of the newest and most convincing practical anomalies that would result from the present decision and practice of the United States Forest Service is the question of what rule of law is to govern the 750,000 volt direct current transmission line (a part of the Pacific northwest-southwest intertie extending from the Oregon border to Sylmar, California, which crosses miles of public and national forest lands). This line, which is tentatively scheduled for operation in March 1970, will be jointly owned by a privately-owned public

utility (Edison, 50%), and the Department of Water and Power of the City of Los Angeles, and the Cities of Burbank, Glendale and Pasadena (together, 50%). The permit which the National Forest Service will issue for this line is to be issued in the joint names of the above joint owners as permittees and is for the purpose of transmitting energy available in the Pacific Northwest to Los Angeles at times of the year and at other times of the year for transmission from Los Angeles to the Pacific Northwest.

What rule should apply to this line? The Government says it cannot apply absolute liability to the Department of Water and Power and the Cities because they do not have the authority so to agree, but that it applies to Edison because the contract in regulation for absolute liability is legal, valid and Constitutional. In fact, the Government relies on this position as the very last words of its brief (p. 8, fn. 2), yet here again the United States Constitution (Article VI, Clause 2) which would seem to make the federal forest regulation requiring absolute liability derived from the cited federal statutes, if valid, the Supreme Law of the Land and thus would override the so-called inability of the publicly-owned utilities to commit themselves to absolute liability. This all if the Government's position was valid in the first place. Surely, this dilemma is inescapable, and the Government is "Hoist with his own petar." (William Shakespeare, Hamlet III, iv, 206.)

Respectfully submitted,

ROLLIN E. WOODBURY,
RANSOM W. CHASE,
RICHARD T. DRUKKER,
Counsel for Petitioner.

APPENDIX A.

WESTERN UNION

[Telegram]

CHARGE TO THE ACCOUNT OF
CHASE, ROTCHFORD, DRUKKER & BOGUST

NOVEMBER 13, 1969

HONORABLE JOHN F. DAVIS, CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

RE: SOUTHERN CALIFORNIA EDISON COMPANY VS. UNITED STATES OF AMERICA NUMBER 556

THERE ARE MISSTATEMENTS OF FACT, IN MY OPINION, AND PERTINENT OMISSIONS, IN MY OPINION, IN THE GOVERNMENT'S REPLY TO THE PETITION FOR THE WRIT OF CERTIORARI IN THE ABOVE REFERENCED MATTER, NUMBER 556 IN THE PRESENT TERM OF THE SUPREME COURT. WOULD YOU KINDLY ASK THE COURT IF IT WOULD BE IN ORDER FOR US TO FILE A TWO OR THREE PAGE AFFIDAVIT OF REPLY, IF THE REQUEST HAS NEITHER BEEN GRANTED OR DENIED WHEN YOU RECEIVE THIS TELEGRAM, AND WOULD YOU WIRE ME THE ANSWER OF THE COURT COLLECT.

RESPECTFULLY
ROLLIN E. WOODBURY,
RANSOM W. CHASE
AND RICHARD T. DRUKKER
BY RICHARD T. DRUKKER,
411 WEST FIFTH STREET
SUITE 910,
LOS ANGELES, CALIFORNIA 90013

CC: ROLLIN E. WOODBURY, ESQ.
RANSOM W. CHASE, ESQ.
ALL COUNSEL

WESTERN UNION

[Telegram]

(139).

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RICHARD T DRUKKER—
411 WEST FIFTH ST SUITE 910 LOSA—

FORTY PRINTED COPIES OF REPLY BRIEF SOUTHERN CALIFORNIA EDISON SHOULD REACH THIS OFFICE BY NOVEMBER 26th—

JOHN F DAVIS CLERK